DISPARAGEMENT OF PROPERTY—PROOF OF SPECIAL DAMAGES NOT REQUIRED

Harwood Pharmacal Co. Inc. v. National Broadcasting Co. Inc.
9 N.Y.2d 460, 214 N.Y.S.2d 725, 174 N.E.2d 602 (1961)

Plaintiff, a manufacturer of a product known as "Snooze," brought a libel action against defendant alleging that one of the stations' performers displayed an object purporting to be a package of plaintiff's product "Snooze" to his audience and said, "Snooze, new aid for sleep. Snooze is full of all kinds of habit forming drugs. Nothing short of a hospital cure will make you stop taking Snooze. You'll feel like a run-down hound dog and lose weight!"[1] Defendant moved to dismiss "because the allegedly televised statements were not defamatory *per se* of plaintiff itself as distinguished from its product Snooze and no special damages were set forth."[2] The New York Court of Appeals affirmed the denial of the motion to dismiss, holding there was libel *per se* as to plaintiff and therefore special damages need not be shown.

In *Marlin v. Shields*, cited by the court, it was held that "where the libel or slander is of a manufactured article, and does not directly impeach the integrity, knowledge, skill, diligence or credit of the plaintiff, the words are not actionable at law unless special damages be alleged and proved."[3] While some form of this rule is generally subscribed to in most jurisdictions, its application has led to considerable difficulty.

Defamatory communications about property have become known as a separate tort, "disparagement of property," as distinguished from libel. However, it is not always easy to differentiate the two actions. As evidenced by decisions, there is a reluctance on the part of courts to allow individuals to recover for derogatory remarks about their products without a showing of special damages even where the statements make an indirect reference to the person connected with the product.[4]

In March, 1960, the New York court ruled in *Drug Research Corp. v. Curtis Publishing Co.* that there was no libel where a magazine article disparaged a weight-reducing pill produced by plaintiff, because, although the article mentioned plaintiff's product and charged another corporation

---

[1] Harwood Pharmacal Co. v. National Broadcasting Co. Inc., 9 N.Y.2d 460, 462, 214 N.Y.S.2d 725, 726, 174 N.E.2d 602, 603 (1961).

[2] *Ibid.*

[3] Marlin Firearms Co. v. Shields, 171 N.Y. 384, 390, 64 N.E. 163, 164 (1902). The court in this case held that disparagements of the quality, design, and performance of a rifle manufactured by plaintiff were not libelous *per se* as to the manufacturer. While speaking negatively of the firearm, it did not charge the plaintiff with any deceit in selling or lack of skill in manufacturing the rifle.

[4] Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887). In this case, the Massachusetts court held that a comment stating that a dinner was served to which even hungry barbarians might object was not actionable without showing special damages.

with improper advertising, there was no defamation of plaintiff itself.[5] The court in *Harwood* said "the clear distinction between this case and *Drug Research Corporation*, is that this allegedly telecast language could readily be understood by the television audience as charging the manufacturer of "Snooze" with fraud and deceit in putting on the market an unwholesome and dangerous product."[6]

The "clear" distinction noted by the court is not entirely credible. An article disclaiming and disparaging the value of a reducing pill imputes the same amount of fraud as does a television statement questioning the use of a sleeping drug. That the article also questioned the advertising methods of a company representing the manufacturer, rather than the manufacturer itself does not seem to be a substantial distinction. If the court required the showing of special damages in the reducing pill case, it would seem that the same reasoning should apply in *Harwood*. As it stands, the holding is an overextension of the rule laid down in *Marlin v. Shields*.

A rule similar to that of *Marlin v. Shields* prevails in Ohio. In *Cleveland Leader Printing Co. v. Nethersole*,[7] the court adopted the rule laid down in a previous case[8] which said that for words to be actionable *per se* where such remarks refer to the quality of the product rather than the manufacturer, the remarks must infer that plaintiff is guilty of a deceit, malpractice or lack of skill in producing the article.[9] The Ohio Supreme Court held that disparaging remarks about a play owned by plaintiff were not libelous *per se* and therefore not actionable without a showing of special damages. This holding seems to have been followed in subsequent Ohio cases.[10]

---

[5] Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 199 N.Y.S.2d 33, 166 N.E.2d 319 (1960). The magazine article said that the "Wonder Drug Corporation, in a flood of full page newspaper advertisements heralded an allegedly new reducing discovery called Regimen, which required no giving up of the foods you like to eat. In the box . . . of pills, however, were instructions warning you to avoid heavy gravies, oils, thick soup, rice, spaghetti, jam, jelly, noodles, nuts, ice cream, potatoes, cake, candy, chocolate, cereal, crackers, cream, custard, bread, butter, pastry, pudding, sugar, and salt. After an investigation by postal inspectors, officials of the Wonder Drug Corp. voluntarily signed an affidavit of discontinuance."

[6] Harwood Pharmacal Co. v. National Broadcasting Co. Inc. 9 N.Y.2d 460, 463, 9 N.Y.S.2d 725, 727, 174 N.E.2d 602, 603 (1961).

[7] Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735 (1911).

[8] Tobias v. Harlend, 4 Wend. 537 (1830).

[9] Cleveland Leader Printing Co. v. Nethersole, *supra* note 7, at 130, 95 N.E. 738.

[10] Rudolph v. E. W. Scripps Co., 83 Ohio L. Abs. 538 (1959). The Ohio appellate court supported its decision on the basis of the opinion in Cleveland Leader Printing Co. v. Nethersole which, while admitting the difficulty in applying the rule of law to the particular fact situation and noting apparent inconsistencies in decisions, held the rule itself to be well established. Where remarks are made about an individual in respect to his business or profession they may be actionable *per se*; however, such remarks are not actionable without a showing of special damages where merely spoken in disparagement of one's property. In this case a newspaper statement "House Condemned; 14 Homeless" does not in itself adversely effect the owner in his occupation

The policy behind the rule is that a person producing a product for public consumption should expect criticism intended to inform the people of the quality and nature of the goods involved. In balancing the interests of the parties, the public interest and the right of freedom of speech and press should outweigh the manufacturer's interest in having his product protected from derogatory statements. Application of the rule does not necessarily deprive plaintiff of a remedy but merely requires that special damages be shown to establish his cause of action. Inability to prove damages will prevent his recovery and in most cases policy considerations justify this result.

---

as a painter and repairer of buildings. To recover there must be a showing of special damages.